Kamtech, Inc. *and* International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL–CIO. Cases 25–CA–25047–1 and 25–CA–25047–2

January 31, 2001

DECISION AND ORDER

BY MEMBERS LIEBMAN, HURTGEN, AND WALSH

On July 23, 1999, Administrative Law Judge Karl H. Buschmann issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs. The General Counsel and the Charging Party filed answering briefs to the Respondent's exceptions, and the Respondent filed a reply brief, as well as an answering brief to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions,[2] as modified and set forth in full below.[3]

1. The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to "hire or consider for hire" Michael Cornell as a welder at its Hawesville facility. We agree that the Respondent, due to union animus, failed to give Cornell, a former Kamtech welder, an opportunity to take a welding test in order to determine whether he was qualified for a welding job.[4] The welding test was an established part of the Respondent's hiring process for welders,[5] and the Respondent administered the test to a number of other job applicants during the period when Cornell was requesting reemployment. We therefore adopt the judge's finding that the Respondent unlawfully refused to consider Cornell for employment.[6]

However, because it is unclear whether Cornell would have passed the welding test had he taken it, we cannot find that the Respondent unlawfully refused to hire him.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent excepts to the judge's crediting of employee Mark Rountree notwithstanding Rountree's 1997 conviction for shoplifting. The Respondent contends that Rountree "lied" by failing to reveal this conviction during his cross-examination. The record, however, does not establish that Rountree deliberately withheld the fact of the conviction. Although the Respondent's counsel identified a 1983 conviction and then asked Rountree about "other convictions," he chose to end his cross-examination immediately after Rountree responded by identifying a second 1983 conviction. More significantly, the judge subsequently noted on the record that criminal convictions involving dishonesty are relevant in assessing credibility and admitted a Respondent exhibit documenting Rountree's 1997 conviction. It is accordingly clear that the judge took the conviction and related testimony into consideration, even though he did not refer to the conviction in his decision. See *Franklin Iron & Metal Corp*., 315 NLRB 819 fn. 1 (1994).

In describing the testimony of witness Wilmer Sellers, the judge mistakenly states that Sellers testified that while he was administering a welding test to applicant Richard Griffin, Griffin volunteered to him that he was a union member. In fact, Sellers testified that it was sometime later, after Griffin had been hired by the Respondent, that Griffin volunteered the information about his union affiliation. Sellers' testimony on this point is not material to the judge's stated reasons for finding Sellers' testimony to be generally less credible than that of witnesses Mitch Dotson and Robert Young. Thus, the error is not grounds for overturning the judge's credibility determination.

[2] No exceptions were filed to the disposition of allegations dismissed by the judge.

[3] The General Counsel filed limited exceptions to the judge's failure to provide language in his recommended Order and notice explicitly protecting the seniority and other rights the discriminatees would have enjoyed absent the Respondent's discrimination against them. We find merit in these exceptions and will accordingly modify the judge's recommended Order and notice.

[4] We reject the Respondent's contention that the judge erred in relying on certain testimony from Ricky Cox because it was "double hearsay." Cox, a welder at the Respondent's Hawesville facility whom the judge credited as "the most impartial witness," testified that he learned that the Respondent needed additional welders at Hawesville. He contacted Rountree (who had recently been terminated from the Respondent's Owensboro facility) to confirm that Rountree was available for work. Cox then suggested Rountree's name to Hawesville Pipe Foreman Okie Lacey, one of four foremen whom the judge found to be statutory supervisors. (The Respondent has not excepted to that finding.) Then, according to Cox:

> He [Lacey] said, yeah, we need—we can use a welder, and he went down to the office and came back later and asked me the guy's name again. I said Mark Rountree, and he said, well, we can't hire him, they've got him on a list down here. He started some union problems at [the Owensboro facility], trying to organize the union.

Contrary to the Respondent's contention, Lacey's statements are attributable to the Respondent as a party admission not barred by the hearsay rule. E.g., *Quality Control Electric,* 323 NLRB 238 (1997); *Glenroy Construction Co.*, 215 NLRB 866 (1974), enfd. 527 F.2d 465 (7th Cir. 1975). The judge's reliance on Cox's testimony to support his finding that the Respondent acted from union animus in discharging Roundtree and in refusing to allow Cornell to take a welding test was accordingly permissible.

[5] The Respondent's practice was to hire apparently qualified applicants and administer the welding test during their first day of employment.

[6] The Respondent does not dispute that under its hiring policy Cornell was entitled to a hiring preference over applicants who were not former Kamtech employees. Further, the General Counsel does not dispute that the Respondent was in need only of "tig" welders on the date Cornell attempted to apply. The Respondent's assessment of whether the applicant was qualified to work as a tig welder was dependent on the applicant's performance in the welding test, and the Respondent's project manager conceded that Cornell would have been hired if he had been a tig welder. The judge's analysis of the refusal-to-consider violation is therefore consistent with the Board's recent decision in *FES*, 331 NLRB 9 (2000).

Accordingly, consistent with *FES* supra, we will modify the remedy in the judge's recommended order to require the Respondent, upon Cornell's request, to administer the welding test to determine whether he was qualified to perform welding work of the type required at the Respondent's Hawesville facility from July through August 1996. The Respondent will be required to offer Cornell employment and make-whole relief contingent on the outcome of that test, as determined in the compliance stage of this proceeding, and pursuant to the requirements of *Dean General Contractors*, 285 NLRB 573 (1987).[7]

2. The judge found that the Respondent unlawfully refused to hire Mitch Dotson and Robert Young. The Board's decision in *FES* sets forth the framework for analysis of refusal-to-hire and refusal-to-consider violations. The Board has decided to remand the allegations concerning the refusal to hire Dotson and Young to the judge for further consideration in light of *FES*, including, if necessary, reopening the record to obtain evidence required to decide the issue under the *FES* framework.

The Respondent has excepted to the judge's findings that it committed other violations of Section 8(a)(1) and (3) of the Act. We find no merit in the exceptions and adopt the judge's findings. Neither these findings, nor the findings concerning the discharge of Mark Rountree and the refusal to consider for hire Michael Cornell, implicate our decision in *FES*, and there is no reason to delay the resolution of those portions of the case pending the outcome of the limited remand we are ordering with respect to Dotson and Young. Accordingly, we have decided to issue a final Order with respect to those violations. See *Masiongale Electrical-Mechanical, Inc.*, 331 NLRB 534 (2000).[8]

[7] The judge's recommended remedy would require the Respondent to reinstate Mark Rountree to his former position, and to hire Cornell for the position for which he applied, or to "substantially equivalent positions at new jobsites, if necessary." There is insufficient evidence in the record to establish whether the Respondent has a policy or practice of transferring job applicants or employees from one site to another, an issue which we find was not fully litigated in the underlying proceeding. Accordingly, we will also defer this issue to the compliance stage in accord with *Dean General Contractors*.

For reasons set forth in his dissents in *Ferguson Electric Co*., 330 NLRB 514 (2000), and *Tualitin Electric,* 331 NLRB 36 (2000), Member Hurtgen disagrees with *Dean*, at least as applied to "salt" situations. In Member Hurtgen's view, it is appropriate, in these situations, to place on the union the burden of coming forward with evidence that the "salt" would have gone on to subsequent jobs if he had not been discharged.

[8] Although we agree with the judge that employee Rountree was unlawfully discharged, we do not rely on his finding that Rountree was discharged "for his refusal to work under unsafe conditions." We find it unnecessary to resolve the question of whether the assigned work was in fact unsafe. Rather, we agree with the judge's finding that the work assignment was discriminatorily motivated, and that the Respondent would not have insisted on pain of discharge that Rountree perform the task as ordered had it not been for his protected concerted activity. As noted by the judge, this finding is supported by evidence that after discharging Rountree, the Respondent did not attempt to have any other employee perform the task in the manner in which it had ordered Rountree to perform it, and that the work was eventually accomplished by building a scaffold, as Rountree had requested.

ORDER

The National Labor Relations Board orders that the Respondent, Kamtech, Inc., Woodstock, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to consider for hire applicants for employment because they are union supporters.

(b) Interrogating applicants for employment about their union background.

(c) Placing employees' union activities under surveillance, and creating the impression that such activities are under surveillance.

(d) Denigrating employees for their union support.

(e) Informing or indicating to employees or job applicants that applications for employment will not be considered because of applicants' union support.

(f) Informing employees that engaging in union activities will be futile.

(g) Assigning employees to more onerous working conditions, reprimanding employees, shortening employee breaks, and discharging employees because of their union activities.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Mark Rountree immediate and full reinstatement to his former job, and if that job no longer exists, in a substantially equivalent position**,** without prejudice to his seniority or any other rights he would otherwise have enjoyed.

(b) Make Mark Roundtree whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay is to be computed on a quarterly basis as prescribed in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

(c) Within 14 days from the date of this Order, upon his request, offer to give Michael Cornell a welding test in order to determine whether he was qualified to perform welding work of the type required at the Respondent's Hawesville facility from July through August, 1996, and, contingent on the outcome of that test, offer

him employment in a substantially equivalent position, without prejudice to his seniority or any other rights he would otherwise have enjoyed.

(d) Make Michael Cornell whole for any loss of earnings and other benefits suffered as a result of the discrimination against him.

(e) Within 14 days from the date of this Order, remove from its files any reference to Mark Rountree's written reprimand and unlawful discharge, and any reference to the refusal or failure to consider Michael Cornell, and within 3 days thereafter notify each individual in writing that this has been done and that the reprimand and discharge, or the refusal to consider for employment, will not be used against him in any way.

(f) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, Social Security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facilities in Woodstock, New York; Owensboro, Kentucky; and Hawesville, Kentucky, and all other places where notices customarily are posted, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that the Respondent fails to ensure that the notices are not altered, defaced, or covered by any other material, or in the event that the Respondent has gone out of business or closed any of the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 4, 1996.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply with this Order.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading, "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

IT IS FURTHER ORDERED that the issue of whether the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire Mitch Dotson and Robert Young is severed from the rest of this proceeding and remanded to the administrative law judge for appropriate action as noted above.

IT IS FURTHER ORDERED that the administrative law judge shall prepare a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order, as appropriate on remand. Copies of the supplemental decision shall be served on all parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against employees because they engage in union activity protected by the Act.

WE WILL NOT fail and refuse to consider applicants for employment because they are union supporters.

WE WILL NOT interrogate applicants for employment about their union background.

WE WILL NOT place employees' union activities under surveillance, or create the impression that employees' union activities are under surveillance.

WE WILL NOT denigrate employees because of their union support.

WE WILL NOT inform or indicate to employees or job applicants that applications for employment will not be considered because of applicants' union support.

WE WILL NOT inform employees that engaging in union activities will be futile.

WE WILL NOT assign employees to more onerous working conditions, reprimand employees, or shorten employee break, because of their union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Mark Rountree immediate and full reinstatement to his former job or, if that job no longer exists, in a substantially equivalent position without prejudice to his seniority or any other rights he would otherwise have enjoyed.

WE WILL, within 14 days from the date of this Order, make Mark Rountree whole for any loss of earnings and other benefits suffered as a result of the discrimination against him.

WE WILL, within 14 days from the date of this Order, upon his request, offer to give Michael Cornell a welding test in order to determine whether he was qualified to perform welding work of the type required at our Hawesville facility from July through August 1996, and offer him employment in a substantially equivalent position**,** without prejudice to his seniority or any other rights he would otherwise have enjoyed.

WE WILL, within 14 days of this Order, make Michael Cornell whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, contingent on the outcome of that test.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to Mark Rountree's written reprimand and unlawful discharge, and any reference to the refusal to consider Michael Cornell, and within 3 days thereafter notify them in writing that this has been done and that the reprimand and/or discharge and/or refusal to hire or consider for employment will not be used against them in any way.

WE WILL preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

KAMTECH, INC.

Michael T. Beck, Esq., for the General Counsel.

Cameron S. Pierce and *Eric Smith, Esqs*., of Atlanta, Georgia, for the Respondent.

Michael T. Manley, Esq., of Kansas City, Missouri, for the Charging Party.

DECISION

STATEMENT OF THE CASE

KARL H. BUSCHMANN, Administrative Law Judge. This case was tried in Owensboro, Kentucky, on May 5–7 and June 23–25, 1998, upon a consolidated complaint, dated April 30, 1997. The charges in support of the complaint were filed on November 12, 1996, and on April 17, 1997, as amended, by the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL–CIO (the Union). The allegations in the complaint accuse the Respondent, Kamtech, Inc., of violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act), including unlawful surveillance of its employees, threats directed at employees, discriminatory discharges, and refusals to hire because of the applicants' union activity.

The Respondent's answer filed on May 14, 1997, admitted the jurisdictional aspects of the complaint and denied the allegations of unfair labor practices.

On the entire record, including my observation of the demeanor of the witnesses and after consideration of the briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Kamtech, Inc., headquartered in Woodstock, New York, and a manufacturing facility in Owensboro, Kentucky, is engaged in the construction industry doing residential, industrial, and commercial construction. With purchases and receipts at its Owensboro facility of goods in excess of $50,000 from points outside the Commonwealth of Kentucky, the Respondent is admittedly an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Union has been a labor organization within the meaning of Section 2(5) of the Act.

Background

Kamtech had two projects in Kentucky, one in Owensboro and one in Hawesville. In Owensboro, Kamtech was engaged in the construction of a paper manufacturing facility for Kimberly-Clark from August 1995 to April 1997, which among other employees, required the work of welders, pipefitters, riggers, millwrights, helpers, or laborers. Kamtech also performed work on a wastewater plant for Kimberly-Clark in Owensboro. In Hawesville, Kamtech built a boiler as part of a paper digestive system from April 1996 to February 1997. Most of the allegations of unfair labor practices occurred on the Owensboro project under the direction of Brian Kear, project manager and John Webster, the piping superintendent. The supervisory hierarchy under Webster included David Umstead, general foreman, who supervised the following foremen: Buddy Thompson, Eric Blackwell, James (Jimbo) Haberzettle, Bob Browning, and Dennis Beaton. The supervisory status of the foremen is contested by the Respondent.

In summary, the General Counsel's case shows that in May 1996, the Union, [Boilermakers] commenced an organizational campaign at Kamtech with a meeting between the Union's organizer, Eugene Forkin and Tony Tarlton, a Kamtech employee in Owensboro. In June 1996, another Kamtech employee Mike Cornell joined the Union's effort to organize the employees in Owensboro. In May, the Union's organizer encouraged two union members who were unemployed, Robert Young and James Dotson, to apply for jobs at the Owensboro project. Dotson had gone to the union hall in search for work at a time when the Union was aware that Kamtech needed welders. The two applicants went to the jobsite in the middle of May and spoke at the entrance through the fence to John Webster. He made a note of their names. On June 4, 1996, John Miller, Kamtech's office manager, called the applicants to fill out an application and to take a welding test. The test was administered by Wilmer Sellers, Respondent's quality control person. He asked the applicants whether they were union affiliated. Dotson and Young admitted that they were union members. Thereafter, Sellers informed them that they had failed the welding test.

On June 18, 1996, union organizer Forkin met with about 20 Kamtech employees at a local restaurant to solicit for the Union and to distribute union cards. Forkin also established an organizing committee, which included Mark Rountree, a Kamtech employee. On June 19, 1996, the Union delivered a letter to John Webster about the organizing committee. The letter listed the names of the union members on the committee.

Mark Rountree, employed at Kamtech since December 1995, was among those listed on the letter. He had joined Tarlton and Cornell in prounion activities at the jobsite. Rountree was disciplined for leaving his workstation, assigned to more onerous work, and ultimately discharged on June 19, 1996. His supervisor had told him that "walls have ears."

On June 20, 1996, Forkin and seven union members went to the Kamtech jobsite and tried to apply for work. Forkin and Mike Tucker, one of the applicants, approached the gate and

asked to speak to John Webster. Sabrina Schultz, the office secretary, spoke to the applicants. She said that Kamtech needed welders and fitters. Forkin gave her a letter, which listed the seven unemployed applicants and identified them as union members and asked that the letter be given to John Webster. Schultz went back to the office and returned shortly thereafter and said that the Respondent wasn't hiring.

Michael Cornell who was laid off at the Owensboro site, applied for work on July 9, 1996, at the Hawesville project and on several days thereafter. He was not hired because he was identified as a union organizer while he worked at the Owensboro project.

On July 19, 1996, Tony Holcomb, employed since April 1996, as a pipefitter was discharged ostensibly from leaving his job early. Holcomb had been a strong union supporter.

The Respondent, in a detailed brief characterized the Union's efforts gain employment for its members and to organize the Respondent's employees as a "Fight Back Campaign," and "Project Targeting," but the Respondent also maintains that the General Counsel failed to prove any violations under Section 8(a)(1) and (3) of the complaint. For example, the Respondent argues that Kamtech was not looking for employees when the union applicants attempted to gain employment, that the applicants were in any case not bona fide applicants and that they failed to apply properly or effectively. The Respondent also argues that Dotson and Young falsified their applications, that their failure to pass the welding test was not influenced by union considerations and that their reasons for applying was only motivated by financial interest to obtain backpay and to demonstrate union loyalty. Holcomb's discharge, according to the Respondent, was solely caused by his poor performance and without any regard to his union affiliation. Respondent's justification for Rountree's discharge was similarly explained, as being for just cause. Rountree, according to the Respondent was discharged for refusing to perform an assignment on his job. The Respondent further argues that certain statement made by Foremen James Haberzettle and Bob Browning did not interfere with, restrain, or coerce employees in the exercise of their statutory rights and that in any case, foreman were not supervisors in the meaning of the Act. And Michael Cornell, who was laid off shortly after his union activity, was refused employment at the Hawesville project, because Cornell was qualified only as a structural welder and not as a "Tig" welder and therefore was not needed at that project.

The issues in this case are: (a) Whether the Respondent violated Section 8(a)(1) of the Act by coercively interrogating employees, creating the impression that their union activities were under surveillance, informing them that their union activity would be futile, that they would not be considered for employment because of their union affiliation, and that they should work elsewhere; and (b) whether the Respondent violated Section 8(a)(1) and (3) of the Act when it disciplined and discharged Mark Rountree and Tony Holcomb, and refused to hire Michael Cornell for the Hawesville project and Mitch Dotson and Robert Young, as well as the eight applicants (Eugene Forkin, Mike Tucker, Gregory Allen, Brian Roberts, David Ogburn, Ed Bennett, Terry Maddex, and John Miller) at the Owensboro worksite.

In addition, it is necessary to decide whether several foremen were supervisors or agents of the Respondent within the meaning of the Act.

Analysis

Kamtech's Foremen were Supervisors

David Umstead at the Owensboro project and Alexander "Okie" Lacey at the Hawesville jobsite were employed as general foremen during the relevant period in 1996 and 1997. Umstead, general foreman of the pipe work at the Owensboro project, had five foremen under his direction. They (James Haberzettle, Bob Browning, Buddy Thomson, Eric Blackwell, and Dennis Beaton) each led a pipefitting crew of up to 15 welders, pipefitters, and helpers. Craig Gaston was a field foreman. Each foreman was responsible for a certain assigned area on the project. They were responsible for the timely and proper completion of the piping work. To that end, they exercised discretion in assigning work to the employees, directing their work and in disciplining them. According to John Webster's testimony, the foremen were authorized to discipline employees for such misconduct such as absenteeism or tardiness and they also exercised that authority. Moreover, if an employee needed time off work, the proper chain of authority would require him to make the request initially to his respective foreman. The foremen held weekly meetings with their respective crews, they watched over the employees' day-to-day work. The foremen themselves performed little piping work, most of their time was spent in completing paperwork, inspecting employees' work and assigning work. As a result of each foreman's responsibility to complete a certain assigned area of the project, it is clear that he exercised considerable, independent discretion and judgment over his crew. The foremen received their assignments from the General Foreman Umstead and the Project Manager Webster. The foreman received the blueprints of his section of work from the general foreman. While the foremen lacked the authority to hire or fire employees, they could effectively recommend that an applicant be hired or that an employee be fired. In only a few instances, their recommendations were not followed, as for example when foreman Eric Blackwell had recommended the discharge of an employee assigned to him. Webster attributed the problem to a personality conflict. In most other respects, foremen exercised no authority to change the Company's work rules, promotion policy, or pay raises.

According to the express provision of Section 2(11) of the Act, the piping foremen were supervisors. Even though they lacked the authority to hire, transfer, suspend, lay off, recall, promote, or discharge any of the members of their crew, they had the clear authority to assign work and to discipline employees, and to responsibly direct them.

Section 2(11) provides:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsible to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The record shows that foremen effectively recommended candidates for employment. Clearly, the authority of these foremen exceeded the making of routine assignments comparable to the function of a leadman. I, accordingly, find that Haberzettle, Browning, Gaston, and Thomson were supervisors within the meaning of the Act.

The record shows and the Respondent concedes that "Webster and Umstead were vested with "genuine management prerogatives." Alexander "Okie" Lacey was general foreman at the Hawesville project. Without doubt, they, as officials to whom the foremen reported, were supervisors within the meaning of the Act.

Wilmer Sellers who was Respondent's quality control person administered welding tests to prospective employees. He testified that he inspected welds, tested welders, inspected concrete, and prepared written reports. According to Kamtech's policy, all welders had to pass a welding test. Sellers would determine whether an applicant would possess the skills to work as a welder. Sellers testified that he has several different types of tests, which he can administer. There is a "tig" weld or a "stick" weld. Test takers can take either one. They were usually instructed to tack up two pieces of pipe, which should be "flush" or better on the inside of the pipe. A "route pass" should be better than flush so that the inside of a pipe does not show a concave connection. If it were somewhat concave on the inside, he would not pass a welder. Sellers used a special mirror and a flashlight to inspect the inside of a pipe. If the pipe weld would be flush or better but still show a "little bitty certain spot" but the rest would be slick and smooth on the inside, he would pass the individual's effort. Once the weld has passed visual inspection, it is submitted to an ex-ray company. Individuals who fail to pass Sellers' visual inspection fail and are not employed as welders for Kamtech.

Sellers administered tests to two applicants Mitch Dotson and Robert Young. Sellers examined their welding test briefly and informed them that they had failed. As a result, they were not hired by Kamtech.

The General Counsel and the Charging Party argue that Sellers must be considered a supervisor within the meaning of the Act, because he had the authority to effectively recommend that an applicant be hired or not be hired. In this regard, I agree with the Respondent, that Sellers was not a supervisor. He had no subordinates, but functioned essentially as an agent for the Respondent to determine an applicant's ability to perform a job. Sellers' assignment was an integral part of the Respondent's hiring process. In that function, Sellers exercised independent judgment as to whether applicants passed or failed. His authority included the necessary discretion to excuse imperfections of a weld in order to pass the individual. And he exercised that authority and judgment in the interest of his employer.

I find on the basis of the record evidence summarized above, that Sellers acted as Respondent's agent as defined in Section 2(13) of the Act, particularly in his conduct of administering the testing of two union applicants.

Allegations Relating to Mitch Dotson and Robert Young

In late May 1996, Mitch Dotson and Robert Young, two members of the Boilermakers Union, Local 40, attempted to gain employment at Kamtech in Owensboro. Young and Dotson had been members of Local 40 since 1977 and 1978, respectively, and were unemployed in May 1996. They went to their Union in search of work and were informed by Joe Medley, the union's assistant business manager that Kamtech was hiring. They went to the Owensboro project and spoke with John Webster through the fence at the gate. Webster told them that he needed pipefitters, but not welders at the time but he made a note of the names. On June 5, 1996, Office Manager Johnny Miller called Dotson about a welding position. Dotson informed Young and they reported on June 5, 1996, at Kamtech's construction site in Owensboro. As directed, they filled out employment applications, they watched a safety program, and took a drug test. They were then given a welding test by Wilmer Sellers. Dotson completed the welding test within 20 minutes, examined it with his flashlight and a mirror and thought that it was perfect. Young also inspected Dotson's work and found nothing wrong with it. Sellers then inspected the weld for 30 or 45 seconds and asked whether they had been welding boilers. They answered, yes. Sellers then asked: "Are you all union?" They said, yes, but added that they also worked for nonunion companies. Sellers looked at the tested material again for a few seconds and said, "you failed the test."

Sellers then told Young to perform the welding test. When he was finished, Young thought his test looked excellent. Sellers briefly inspected the test and similarly said that Young had failed the test.

This scenario is based upon the credible and consistent testimony of the two applicants, Dotson and Young. While Sellers denied asking them any questions about the Union or their union affiliation, he generally agreed that he administered the welding test to Young and Dotson, that he examined their work and decided that they had failed. He also recalled asking them questions about their prior work and experience, but he could not recall anything more specific. Sellers testified about his experience with another applicant, Richard Griffin, who had passed Kamtech's welding test, even though he, according to Sellers, had volunteered his union affiliation during the taking of the test. The record, however, shows that Sellers had not administered the test nor was he the one responsible for administering the welding test on May 28, 1996, to Griffin. It was Ricky Osteen, who like Sellers, was the welding technician on that day. Sellers' testimony in this regard, as well as his demeanor as a witness rendered his testimony generally less credible than that of Dotson and Young.

I therefore find that Sellers interrogated the two applicants about their union background and gave them a failing grade because they had disclosed their union affiliation. This is particularly so, because Young and Dotson not only regarded their own welding samples as flawless, but they also inspected each other's test results and concluded that there was nothing wrong with them. Young and Dotson were highly experienced welders with about 20 years' experience. Young described how Sellers examined Young's testing sample soon after it was finished and that after only 5 seconds Sellers concluded that Young had failed. Generally, it takes about 30 or 45 seconds to properly examine a welding sample. It is also clear that Young and Dotson would have been hired if Sellers had approved their tests. The reason for Sellers' disapproval was not the inadequacy of the actual welds but Sellers' antiunion animus, which he had exhibited by interrogating the applicants about their union background. That the interrogation about an applicant's union affiliation during the application process is coercive, is well settled. Such conduct violates Section 8(a)(1) of the Act. Respondent's rejection of the two applicants for jobs because they had revealed their union affiliation, violated Section 8(a)(1) and (3) of the Act. The Respondent has not overcome the inference that Sellers' testing results were a clear pretext to keep these applicants from being employed by Kamtech. The Respondent has failed to meet the test in *Wright Line*, 251 NLRB 1083 (1980), that Young and Dotson would have been rejected for employment even in the absence of any union considerations.

The Respondent assailed the testimony of Young and Dotson on several grounds, including the apparent inconsistency of the initial concealment of their union affiliation and their prompt disclosure of it during the welding test, their tacit reaction and acceptance of a failing grade, their inconsistent testimony about the right to reapply for a job, and their misrepresentations on their applications. Respondent's counsel also characterized Young's testimony as "unmitigated belligerence at the hearing." In this regard, I found the testimony of Young, as well as other witnesses remarkably restrained under the pressure of intense and often hostile cross-examination. Moreover, none of the Respondent's record references support counsel's assertions about the witness' belligerence.[1] I found Young and Dotson's testimony consistent and unequivocal. The mere failure of Dotson to recall Sellers' statement that they had a right to reapply does not affect his credibility. Moreover, the witnesses provided plausible reasons for their acceptance of Sellers' judgment of their welding tests. They also conceded during the hearing that their applications were inaccurate, because they had attempted to hide their work for union employers. Finally, there is no evidence showing that the applicants were motivated by financial interests other than to gain employment and to organize the employer.

Allegations Relating to Tony Tarlton

Tarlton had been working for Kamtech at Owensboro since May 1996. In June 1996, Tarlton began to discuss organizing the job with other employees. The Union prepared a letter, dated June 19, 1996, listing 14 union organizers and informing John Webster of the organizing effort (GC Exh. 2). Tarlton delivered the letter early on June 19, 1996, to Webster and began to wear union insignia right after the delivery of the letter. According to Tarlton's testimony, General Foreman David Umstead and Foreman Haberzettle walked up to Tarlton laughing and Umstead saying to him, "if [you] was union, why don't [you] go work at a union job" (Tr. 42).

Umstead denied making that comment. He also denied noticing Tarlton's union button. I found his testimony unconvincing and credit Tarlton's testimony. However, contrary to the General Counsel's and the Union's arguments, I find that the remark was not coercive under the circumstances. The record clearly shows that Umstead was laughing at the time he made the comment. Indeed, Tarlton retorted, asking Umstead if he was harassing him, because of the union button, Umstead, retreating, laughed and walked off. I find that the comment was made more in jest than in an attempt to coerce the employee. I accordingly dismiss the allegation.

Allegations Relating to Mark Rountree

Working initially as a carpenter for Kamtech in December 1995, Rountree was transferred to the piping crew in early 1996. General Foreman Umstead assigned him to piping foreman, Haberzettle for about 3 weeks. He was then transferred to Foreman Browning until his discharge on June 19, 1996. During that time, Browning assigned work to him, supervised him, and disciplined him. Rountree worked together with a helper named Kenneth Lee. In his daily routine, Rountree obtained his work assignments from Browning. Rountree worked with Lee who would often remain with the assigned task longer in order to finish it up, while Rountree would proceed to his next assignment.

In early June, Rountree learned from another employee, Tony Tarlton, that the Union intended to organize the employees at the Owensboro project. Also discussed among the employees was a union meeting scheduled for June 18, 1996. Rountree discussed the Union and the union meeting with other employees. On the morning of June 18, 1996, Rountree was approached by Respondent's safety officer who had selected Rountree and others for a random drug test. The testing, according to Rountree, took about 2 hours. When he returned to his workstation, he found that Browning had given him a written reprimand for being away from his work. When Rountree protested and tried to explain that he was gone for 2 hours because of a drug test, Browning rejected his explanation and said that he needed to watch his step and that the walls have ears and that he better watch what he got involved in. Rountree then appealed to Webster to explain his side of the story. But Webster supported Browning's action.

The General Counsel and the Charging Party submit that the Respondent violated Section 8(a)(1) of the Act by unlawfully creating the impression that the employees' union activities were under surveillance and that the disciplinary warning violated Section 8(a)(1) and (3) of the Act.

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[1] Any display of belligerence did not come from any witnesses but from Respondent's counsel whose demeanor was often provocative and unnecessarily confrontational towards the employee witnesses.

The Respondent argues that Browning was unaware of Rountree's union sympathy that Browning never made the comments attributed to him and that Rountree would have been disciplined even in the absence of any union activity.

Rountree's testimony impressed me as specific and consistent. He appeared certain and convincing. I accordingly credit his recollection of the incident over Browning's testimony to the contrary. I further find that Browning's references to walls having ears and to watch what he got involved in, could only be referring to Rountree's union sympathy and the union meeting scheduled for the same day, June 18, 1996. Rountree's scenario on that day is supported by the testimony of David Frew, Respondent's safety officer, as well as documentary evidence such as a list of employees selected for the drug test as well as a sign-in log all of which show that Rountree was indeed subjected to a random drug test on that day. Although Frew testified that a drug test would usually not last more than 20 minutes, he conceded in his testimony that an employee could be delayed if a nurse were tending to an injured employee.

On the basis of the record evidence and the credible testimony of Rountree, I find that Browning's conduct amounted to a violation of Section 8(a)(1) for creating the impression that the employee's conversations about the union were overheard by management and that it engaged in unlawful surveillance of employees' union activities. I further find that the General Counsel has shown that the disciplinary warning issued by Browning was motivated by union animus. Under *Wright Line*, supra, the Respondent has failed to show that other employees were similarly reprimanded for being absent from the workstation because of any drug testing. Neither Browning nor Webster bothered to check Rountree's excuse for his delayed absence. Brownings' explanation for the discipline showed that he was warning the employee about his union talk with fellow employees.

On the following day, June 19, 1996, Rountree engaged in more open union activity and was ultimately discharged. Tony Tarlton, who was employed as a welder, delivered a letter prepared by the Union to John Webster on that day informing him that several employees, including Mark Rountree, Mike Cornell, and Tony Tarlton had become union organizers. Rountree also had union stickers and authorization cards at work and wore union insignia. According to Rountree, his supervisor Browning was suddenly "hound dogging" (observing) him. He saw Browning as he kicked union material off Rountree's lunch box. During the morning break, Rountree began to distribute union authorization cards to other employees. Browning came into the break area after about 5 minutes of the break had elapsed and when he saw the union activity he ordered the employees to go back to work. Rountree protested saying that they were only 5 minutes into the break. Browning replied, "I guess we have been too good to you." In short, the Respondent suddenly changed its break policy because the employees had engaged in union activity. Browning also told him, "its time for you to go to be at work, you're supposed to be working. . . . I've just got the job for your instigating ass" (Tr. 159). At that point he ordered Rountree to install anchor plates on a beam 14 feet from the bottom. This task required the drilling of a hole into concrete in order to attach a steel plate. There was an additional drop in height of 8 feet on the other side, so that the employee working on top of a ladder with the necessary tools would risk a fall of about 22 feet without counting a person's height. The task required a drill too heavy for a one handed operation. Kenneth Lee who testified for the Respondent and who worked with Rountree testified that the drilling required the use of both hands, so that the person operating it would have to be "tied off" with a harness.

In any case, Browning and Rountree briefly discussed the job and Rountree pointed out the inherent danger of working on a ladder 14 feet high with a heavy drill, and suggested the use a lift or a scaffold. Browning, however, told him that the scaffold material was in use and the carpenters were too busy, and that he could not use the lift. He ordered Rountree to perform the job instantly. At that point, Rountree stated that the job was unsafe. Browning and Rountree proceeded to debate the issue until Rountree requested the presence of a safety officer. Browning called for John Webster.

According to Rountree, the safety officer, David Frew, initially agreed with him that the assignment was unsafe, but when Webster appeared on the scene, Frew changed his position. After conferring with Webster, Frew said that the job was extremely difficult and that Rountree needed to exercise caution but that the job could be done. Webster then asked Rountree whether he was going to do the job to which Rountree answered "not likely." Webster then said for Rountree to gather his tools because he was fired.

The testimony of Frew, Browning, and Webster differs from that of Rountree. Webster and Browning testified that the assignment was not any more difficult or dangerous than those, which Rountree had done in the past. Frew denied that he regarded the job as unsafe. He testified that he had prepared written notes concerning the incident and that he found no reason for Rountree not to be able to do the work and that the assignment did not present a safety issue.

Ricky Cox a pipefitter with 12 years' experience who had worked at three projects for Kamtech in the past, testified about the incident because he had witnessed it. He described Rountree's assignment as follows (Tr. 253):

> Well, they had him put some overhead hangers up and they was drilling in concrete overhead and they wanted him to do it on a ladder, which they had give him some prior jobs to do, but he had scaffold, but they didn't build him no scaffold for this crew. They wanted him to do it off a ladder.
>
> Well, I was around when the foreman assigned him the job. The foreman told him to drill the holes off the ladder?"

And when asked whether the task was safe he stated, "I wouldn't have done it, I felt like it would have been an unsafe task. I would not want to do it" (Tr. 255).

The work was ultimately done by someone else after a day or so, but according to Cox, "Yes, there was a scaffold built when they would drill" (Tr. 255).

After Rountree had refused to do the job he gathered his tools as he was ordered. On his way to the warehouse, Browning told him that it did not have to be this way "if he had stayed out of this" and that he should have known that Kamtech would not accept "this" but get rid of everybody involved. Browning handed Rountree the termination slip, which reflected that he was discharged for insubordination (R. Exh. 4).

The issue whether Rountree's discharge was motivated by union animus is highly contested. Respondent's witnesses, Webster, Browning, Frew, and Lee testified that Rountree's discharge was unrelated to his union activity. Rountree and Cox testified to the contrary. Cox, for example, testified that his Supervisor Okie Lacy at the Hawesville project needed welders and when he mentioned Rountree's name, Lacy said, "we can't hire him they've got him on a list down here. He started some union problems out at Kimberly-Clark, trying to organize the union" (Tr. 256).

Cox impressed me as the most impartial witness. He was neither a disgruntled employee, nor had he anything to gain by his testimony. His demeanor impressed me as credible and to the point. Lee had similarly nothing to gain from his testimony, but his testimony was not as clear. For example, Lee testified, "we do jobs like that," but then he equivocated, saying "it could be done a lot easier and I'm sure a little safer if it had scaffolding built" and concluding "I was glad that he [Browning] didn't put me in that position that day" (Tr. 1077-78). On balance, the record shows that management in Owensboro knew about Rountree's union support. They scrutinized his work and his union activities. The Respondent created the impression of surveillance, shortened the breaktime and assigned him to more onerous working conditions as a result of his union activity and for the same reason discharged him for his refusal to work under unsafe conditions. The General Counsel has carried the burden under *Wright Line,* 251 NLRB 1083 (1980). The Respondent tried, but failed to prove that anyone was fired for refusing to perform a safe task. There was testimony, as well as documentary evidence that employees were discharged for their refusal to perform assigned work. In this regard, it is important to note that the Respondent did not assign the job which Rountree was expected to do to any other employee. Instead, the work was ultimately accomplished by building a scaffold. I, therefore, find that the Respondent violated Section 8(a)(1) and (3) of the Act.

Allegations Relating to Tony Holcomb

On April 1, 1996, Holcomb was hired as a pipefitter with about 5 years' experience. He took a welding test to qualify as a welder, but he failed the test. He was then assigned as a fitter to join Haberzettle's crew. Haberzettle assigned work to Holcomb for 2 weeks, then Webster

reassigned Holcomb to Foreman Craig Gaston's crew. He worked on a water treatment system for about 1 month under Gaston's supervision. In early June 1996, Holcomb was assigned back to Haberzettle. On June 6, 1996, Haberzettle gave Holcomb a written warning for "Failure to perform work in a reasonable amount of time" (R. Exh. 8). Webster was aware of the reprimand because he had initiated it. Up to that point, Holcomb had not engaged in any union activity. Indeed, he had rejected Mike Cornell's solicitations on behalf of the Union.

On June 19, 1996, Holcomb signed a union authorization card and began to wear union buttons and stickers which identified him as member of the organizing committee. Shortly thereafter, Haberzettle repeatedly referred to him as a "union punk" or "nothing but a union punk." These comments derogating an employee because of his union support were not rebutted in the record. Such conduct interferes with the employees' Section 7 rights and violates Section 7 of the Act.

On or about July 12, 1996, General Foreman, Umstead transferred Holcomb from Haberzettle's crew to the crew supervised by Buddy Thompson. Holcomb worked under Thompson's direction until July 22, 1996. During that time Holcomb was not reprimanded. Nevertheless, Thompson testified that Holcomb's performance was deficient in the sense that he failed to "field verify" the piping, that is he failed to properly align the prefabricated pipes to fit the design. According to Thompson, Holcomb was also slow in his work.

On July 19, 1996, a Friday, Holcomb requested to leave work early for personal reasons. Thompson granted Holcomb's request provided that he finished a particular assignment. Thompson had ordered him to finish fitting an 18-inch pipe between two connections. Holcomb had previously tried and failed to do the assignment properly. Webster had become aware of Holcomb's problems in finishing the work. It was this assignment which Thompson had asked Holcomb to complete on that Friday, Thompson had told him that he needed that 18-inch pipe done, to have it "out prepped and fit up for the welder."

Holcomb left on that Friday without completing the assigned task. And Thompson finished the job himself. On the same day, Thompson and Webster decided to discharge Holcomb. Thompson prepared the termination notice on July 19, 1996. On Monday, July 22, 1996, Thompson informed Holcomb that he was terminated because of unsatisfactory work. Holcomb refused to sign the termination notice and complained that his final check was short by a half hour. Webster, according to Holcomb, said, "you and the union ain't been nothing but a pain in my ass since you've been there" (Tr. 211). Webster denied having made the statement.

Webster impressed me as too sophisticated to make such a comment even if he had harbored such a sentiment. Based on his demeanor, I credit Webster.

According to the General Counsel and the Union, the discharge was actually motivated by the Respondent's union animus and therefore violated Section 8(a)(1) and (3) of the Act. Holcomb was a known union supporter and Haberzettle had shown his antiunion animus. Holcomb could have been disciplined for his deficient work with a lesser penalty, short of a discharge, although the record clearly supports a finding that Holcomb's poor performance was a motivating factor in the discharge. I accordingly find that the General Counsel has presented a prima facie case. However, Holcomb was disciplined for his poor performance even prior to his union activity. Assuming arguendo, that the General Counsel established a prima facie case that the Respondent's action against Holcomb was primarily based on the employer's antiunion sentiment, the Respondent has certainly carried the burden of showing that Holcomb would have been discharged even in the absence of any union consideration. The record shows without contradiction that Holcomb's work was less than satisfactory. The Respondent had assigned this employee to different foremen. They agreed that his work was poor. In my view, the record shows that Holcomb was fired because he had an unsatisfactory work record and then failed to complete the assigned work.

Allegations Relating to Michael Cornell

As an unemployed member of the National Transient Lodge, Michael Cornell called various local unions, including Local 40 in early May 1996. Organizer, Gene Forkin told him to see if Kamtech was hiring. Cornell called Kamtech, spoke to John Webster who inquired about his work experience and reported for work on the following Monday, May 6, 1996. He went through the application process, took a welding test and was assigned to Craig Gaston's crew at the waste water treatment project.

In June 1996, Cornell became involved with the Union's effort to organize Kamtech. He attended a union meeting, wore a union sticker, and volunteered to be a member of the organizing committee. The letter from Forkin which Tony Tarlton, another Kamtech employee, delivered to Webster on June 19, 1996, included Cornell's name as a member of the Union's organizing effort. On the first or second day of his open union support, Gaston made a comment to Cornell "like that isn't going to do any good, it's a waste of time" (Tr. 75-76). Gaston denied ever saying anything negative about the union to Cornell. Wayne Moore, who had worked with Cornell as a helper, supported Gaston's testimony to the extent that he Gaston never said anything adverse about the Union and that he supported the employees' rights to engage in union activities. Supervisor Thomas similarly testified that to his knowledge Gaston never made any adverse comments about the union.

My appraisal of the testimony of the witnesses on the issue of Gaston's antiunion remark is that Cornell and Thomas impressed me as credible. I believe Thomas' statement that he had not overheard any antiunion remarks made by Gaston. However, clearly Gaston could have made such a comment out of Thomas' earshot. Moore had been a county sheriff who had subsequently worked for the Respondent on various projects. At Owensboro, Gaston had been his foreman. Moore had been rehired by the Respondent only a few days prior to his testimony in this case. And I do not regard him as an impartial witness. Based on his demeanor, I found his testimony less than credible. Gaston's testimony was vague on this issue. He merely denied saying anything negative about the Union, although he conceded speaking to Cornell about the Union. I accordingly credit Cornell and I find that the Respondent violated Section 8(a)(1) of the Act by indicating to the employee that the exercise of his Section 7 rights would be futile.

Michael Cornell was laid off on July 1, 1996. Cornell testified that other employees were similarly laid off even before his layoff, and the layoff is not alleged in the complaint as a violation of the Act. However, on July 9, 1996, Cornell inquired at the Owensboro jobsite about employment. A secretary told him that Respondent's project at Hawesville needed people. Cornell called the Hawesville jobsite stating that he was interested in a job as a welder or pipefitter. He was asked whether he had worked for Kamtech before and said, yes, that he had worked at the Owensboro project. Even though he provided his name and telephone number and was told that Kamtech was hiring, he was not contacted. A few days later, he called again and spoke to a secretary who referred him to Marvin Parks, assistant superintendent. Parks confirmed that the Company was in the process of hiring and wanted to know Cornell's name and whether he had been employed previously by Kamtech. Parks assured Cornell that he would call back, but the call never came. Cornell called a third time and spoke to a person he identified as Mr. Wills, an apparent reference to Allen Wilson, the piping superintendent. Again he was assured that someone would call him back. At a fourth attempt, Cornell identified himself to the secretary as "Arthur Cornell." The superintendent, to whom the secretary had referred the call, asked whether he was Michael Cornell. Cornell repeated that he was "Arthur." Again the superintendent said that he would get back with Cornell. But Cornell never received a call from anyone at the Hawesville jobsite.

The reason for Respondent's refusal to hire Cornell may have been explained by Ricky Cox when he testified that superintendent Okie Lacy, referring to Rountree, said, "well we can't hire him, they've got him on a list down here. He started some union problems out at Kimberly-Clark [Owensboro], trying to organize the union." The same rationale is applicable to Cornell who, like Rountree, was listed on the Union's letter to Webster as a union organizer.

The Respondent's witnesses Barry Roberts, project manager, and Superintendent Wilson agreed that Cornell had called numerous times about a job. According to Roberts, he had informed Cornell that he was not interested in structural welders but only "tig" welders or combination welders. Roberts testified that Cornell had identified himself as a structural welder in his first conversation and that if Cornell had represented himself to be a tig welder or a combination welder, he would have been hired. Several weeks later, when Cornell had called again, Cornell identified himself, as a tig welder, but Roberts did not believe him. According to Roberts, tig welding is more complicated than structural welding and Cornell could not have learned the skill in such a short time. Roberts believed that Cornell was lying and accordingly decided not to give Cornell a chance to test his welding skills.

Wilson testified that during his conversation with Cornell, he had identified himself as a structural welder, and had asked questions about the tig welding test. According to Wilson,

Cornell gave several incorrect responses to some of Wilson's questions involving the welding test. This presumably revealed his lack of skills in the tig welding process.

Topper Thomas, one of the superintendents at the Owensboro project, similarly testified about Cornell's welding skills. According to Thomas, Cornell was not a tig welder and would be unable to perform that kind of work. He testified that someone from the Hawesville project had inquired about Cornell's welding ability, but Thomas did not know the caller's identity. Roberts, who made the decision not to hire Cornell, did so without any recommendations from anyone at the Owensboro project. He testified that he did not recall calling the Owensboro project.

Roberts also testified that he was hiring tig welders at the time Cornell had made his efforts to become employed.

On the basis of the record as summarized above, I find that the Respondent refused to hire Cornell because of his union background. First, the Respondent had demonstrated its antiunion animus in connection with the other violations of the Act. Second, the Respondent refused to hire Rountree for union related reasons. Okie Lacey's remark about the applicant's name being on a list in connection with the union is equally applicable to Cornell. Indeed, Cornell as a former employee should have received preferential consideration pursuant to the Respondent's priority hiring system for former Kamtech employees. Third, the Respondent's scenario about Cornell's lack of tig welding skills is implausible and unconvincing. While I believe Respondent's witnesses to the extent that the Hawesville project needed tig or combination welders, the record shows that Respondent's normal course of the hiring process would have included a welding test. Applicants for welding jobs were never identified as tig welders or stickwelders or combination welders at the initial screening process over the telephone. When the Respondent needed welders, they were routinely asked to go through the hiring process, which included a welding test. The test determined whether a welder was qualified or not. The General Counsel has shown that Cornell, a welder with a good work record was not hired at the Hawesville project because of his union affiliation. The Respondent was in the process of hiring welders to fill available jobs. Cornell applied repeatedly as a former employee and, like other applicants, should have been afforded the opportunity to take the welding test to determine whether he was qualified as a welder suitable for employment at the Hawesville project.

The Respondent has failed to show that Cornell would not have been hired even in the absence of any union consideration. *Wright Line*, supra. The scenario that Cornell was not qualified or lied about his ability is simply not credible. Roberts conceded in his testimony that Cornell would have been hired if he had been a tig welder, which is an indication that jobs were available.

Refusals To Hire or to Consider for Hire Eight Union Applicants

On June 20, 1996, after meeting at a Holiday Inn in Owensboro, Eugene Forkin, the union organizer, accompanied by seven union members who were unemployed, drove to Kamtech's Owensboro jobsite. There, Forkin and Michael Tucker went to the gate at the entrance to the jobsite and called out to catch the attention of Respondent's personnel inside the trailer. The other men were instructed to stay in the car. Sabrina Schultz, the Company's secretary, appeared at the gate. Forkin told her that he was there with other applicants in search of work and asked if Kamtech was hiring. According to Forkin, Schultz replied that they were hiring welders and fitters. Forkin then requested to speak to John Webster and to take a letter to him. Schultz took the letter and walked back into the trailer. The letter, dated June 30, 1996, addressed to Webster, identified all eight applicants by name and telephone number and stated that they wished to be considered for employment and that they would exercise their rights to organize in accordance with Section 7 of the Act (G.C. Exh. 4). Parenthetically, the applicants had earlier agreed that "if they're going to go in and go to work and put in application and get hired, that they make a good hand for the company" (Tr. 520). Forkin testified that they "were hoping [they] would get some people in there and show them [Kamtech] what kind of work [they] could do" (Tr. 519).

After about 10 minutes, the secretary came back out to the fence and said that right now there was a hiring freeze. Forkin then described the ensuing conversation (Tr. 524):

> I asked her, I said, five minutes ago you told me you were looking for fitters and welders. She says, well, he told me to tell you that we have a hiring freeze on. I asked her if John Webster had read the letter and she told me that he had. I asked her again, I says, come on, tell me the truth, be honest with me, five minutes ago you were out here telling me that you needed fitters and welders and I says now you have a hiring freeze. She said that's just what he told me to say. And that was the end of the conversation.

Michael Tucker who accompanied Forkin during the conversation with Schultz, generally corroborated Forkin's testimony, but he did not recollect Schultz' initial remark that the Respondent was hiring welders and fitters.

When asked whether the Respondent ever contacted him or anyone on that list for a job, Forkin said, no.

The Respondent's version of the job application by Forkin and the seven union members differs in certain respects. Sabrina Schultz testified that she told the applicant as soon as she was asked about the prospects for employment, "there wasn't any openings" (Tr. 890).

I resolve the inconsistent testimony of the witnesses in favor of Schultz' recollection of what she said on that day, I found her to be credible and to be in a better position to recall what she had said than any hearsay testimony to the contrary. Second, Tucker did not corroborate Forkin's testimony in that regard. Thirdly, the record is not inconsistent with her representation to the applicants that the Company was not hiring. Project manager Kear testified, that by June 17, 1996, the paper machine at Owensboro was substantially completed, which permitted the Respondent to reduce its work force. According to Kear, there was very little work left for pipefitters and welders after June 17, 1996. The Respondent's staffing reports show that employment decreased between April 1996 and June 1996, from 216 to 152 field employees. According to Kear, the trend continued ranging from 135 employees in July 1996, to 100 in August 1996. Other documentary evidence shows that the number of welder positions at Owensboro decreased from 33 welders in June to 25 welders in July 1996 (R. Exh. 52–66).

While the Respondent conceded that it hired a few individuals to replace those who had left their jobs, the Respondent hired a total of 17 employees between June and August 1, 1996 (R. Exh. 55). Six of those were hired as pipewelders and six were pipefitters. The testimony of Kear and Johnny Miller, Respondent's office manager shows that the replacement welders and fitters were hired in accordance with the Company's preferential hiring policy, and that most of them were prior Kamtech employees.

The General Counsel and the Charging Party, nevertheless, argue that the record supports a finding that the Respondent violated Section 8(a)(1) and (3) of the Act, because the eight union applicants were not hired and not even considered for hire because of their union affiliation. They argue that Forkin and the seven union applicants attempted to seek employment in the same fashion as other applicants who were hired, that is by going to the jobsite looking for work, but that the eight applicants were not permitted to fill out applications. They further argue that the Respondent has demonstrated union animus and has refused to hire other individuals for that reason. According to the General Counsel, a prima facie case of discrimination has been made by showing that the applicants filed employment applications, i.e. Forkin's letter, that the employer refused to hire the applicants, that they were suspected or known to be union supporters and that other individuals without union affiliation were hired. *Fluor Daniel, Inc.,* 304 NLRB 970 (1991). The Charging Party submits that even if the record does not support a refusal to hire, it is clear that a refusal to consider for hire has been established.

Here, the employer was faced with a mass application request, otherwise the eight union applicants used an application process similar to that used by other successful candidates. Clearly, it has been shown that the Respondent has refused to hire other applicants because of union considerations. I also agree that the record shows that the applicants were amply qualified as either welders or as pipefitters and that they would have been qualified to perform the work available at the Owensboro jobsite. However, the record shows convincingly that the Respondent was not in a hiring mode on June 20, 1996. The Respondent refused to afford Forkin and his seven union members to fill out job applications, because the Respondent had no immediate need for additional employees. On June 19, 1996, only one day earlier, the Respondent had decided and was committed to hire two applicants. And on July 13, 1996, even Schultz was laid off. According to her testimony, consistent with that of Kear and Miller, there

was little hiring from late June onward. She also testified that prior to her layoff other crews had been laid off. Although six welders and six fitters were hired in July and August 1996, they were replacements. The record consisting of unrebutted documentary evidence shows that one pipefitter reported for work on June 26, 1996. He had been engaged for employment by Webster on June 19, 1996. The Respondent hired one fitter on July 1, 1996, and one welder on July 15, 1996. Three fitters were hired on July 18 and July 23, 1996, and one welder was hired on July 29, 1996. The actual hiring was accordingly not inconsistent with Respondent's representation on June 20, 1996, that it was not hiring. Moreover, the record further shows that the employees hired were, with one exception, former employees of the Company. On balance I find that the General Counsel has failed to make out a prima facie of discrimination. Under *Wright Line*, supra, I further find that the Respondent has demonstrated that the eight applicants would not have been hired even in the absence of any union considerations. They did not meet the criteria under Kamtech's preferential hiring policy. That policy was not shown on this record to be discriminatory. I accordingly dismiss this aspect of the complaint.

CONCLUSIONS OF LAW

1. The Respondent Kamtech, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL–CIO, is a labor organization within the meaning of Section 2(13) of the Act.

3. The Company's foremen, John Webster, Okie Lacey, James Haberzettle, Bob Browning, Jim Umstead, Craig Gaston, and Buddy Thomson were supervisors within the meaning of 2(11) of the Act. Wilmer Sellers, quality control technician, was an agent within the meaning of 2(13) of the Act.

4. The Respondent violated Section 8(a)(1) of the Act by:

(a) Coercively interrogating applicants for employment about their union membership;

(b) Creating the impression among employees that their union activities were under surveillance;

(c) Denigrating employees and calling them derogatory names because of their union activities;

(d) Informing employees that their applications for employment would not by considered because of their union affiliation;

(e) Informing employees that engaging in union activities would be futile.

5. The Respondent violated Section 8(a)(1) and (3) of the Act by:

(a) Issuing a written discipline to its employee Mark Rountree, because of his union support;

(b) Assigning more onerous working conditions to its employee Mark Rountree, because of his union activities;

(c) Changing the length of employees' breaks from 10 minutes to 5 minutes because of the employees' union activities;

(d) Discharging Mark Rountree, because of his union activities;

(e) Refusing to hire or consider for hire Mitch Dotson and Robert Young because of their union affiliation.

(f) Refusing to hire or consider for hire Michael Cornell because of his union support.

6. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent violated Section 8(a)(1) and (3) of the Act, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Having found that the Respondent unlawfully issued a written reprimand to Mark Rountree, assigned him to more onerous working conditions, changed the breaktime, and terminated his employment, the Respondent must offer him reinstatement to his former job or, if that job no longer exists, to a substantially identical position and make him whole for any loss of wages or other benefits be suffered as a result of the discriminatory actions against him in accordance with *F. W. Woolworth Co.,* 90 NLRB 289 (1950) and *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Having refused to hire or consider for hire Mitch Dotson, Robert Young, and Michael Cornell, the Respondent must offer them jobs which they were denied or, if these jobs no longer exist, to substantially equivalent positions at new jobsites, if necessary, and make them whole for any loss of earnings and other benefits as a result of the discrimination in accordance with the same authorities cited above.

[Recommended Order omitted from publication.]